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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NASIR KOSA, BASIL KOSA, and SAID
MATTI,

Plaintiffs

v.

AMERICAN INVSCO, *et al.*,

Defendants

Case No.: 2:12-cv-01108-APG-NJK

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT ON
BENCH TRIAL**

I consolidated five related cases for trial and conducted a bench trial.¹ Each of these actions asserts the same basic claim: that defendant Meridian Private Residences CH, LLC (“MPR”) breached a February 2008 “Condominium Resort Hotel Lease” that MPR entered into with each plaintiff. The leases pertain to the plaintiffs’ condominium units at The Meridian Private Residences (the “Meridian Condo Project”) at 250 East Flamingo Road, Las Vegas, Nevada. As required by Federal Rule of Civil Procedure 52(a)(1), I hereby enter my findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs Nasir Kosa, Basil Kosa, Raad Kosa, and Said Matti are residents of the State of Nevada and were owners of three condominium units located within the Meridian Condo Project, specifically Units 2-236, 6-205, and 7-205. These plaintiffs are collectively referred to as the Kosas.

¹ The cases consolidated for trial are: 2:12-cv-01104 (“Couturier”), 2:12-cv-01106 (“Edalatdju”), 2:12-cv-01107 (“Heldt”), 2:12-cv-01108 (“Kosa and Matti”), and 2:12-cv-01111 (“Kosa”).

1 2. Defendant MPR is a Michigan limited liability company, registered to do business
2 in Nevada.

3 3. On approximately February 1, 2008, Basil Kosa entered into a Condominium
4 Resort Lease with MPR for unit 2-236, effective from February 1, 2008 to March 31, 2010. Exh.
5 13.²

6 4. On approximately February 1, 2008, Nasir Kosa entered into a Condominium
7 Resort Lease with MPR for unit 6-205, effective from February 1, 2008 to March 31, 2010. Exh.
8 15.

9 5. On approximately February 1, 2008, Raad Kosa and Said Matti entered into a
10 Condominium Resort Lease with MPR for unit 7-205, effective from February 1, 2008 to March
11 31, 2010. Exh. 19.

12 6. MPR drafted all of the leases that are at issue in these cases. MPR is referred to
13 as the “Lessee” in the leases. The condominium owners are listed as “Owner” in the leases.

14 7. The leases say that “Owner hereby grants to [MPR] the right to occupy and use
15 the Unit in conjunction with [MPR’s] operation of a condominium resort” *See, e.g., Id.* at 1,
16 ¶ 2(a).

17 8. Section 4(a)(1) of the leases provides that “It is expressly agreed and understood
18 that Lessee is leasing the Property with the intent to sublease the Property.”

19 9. Section 3(a) of the leases provides that MPR “shall pay Monthly Rent . . .
20 commencing with February 2008” Section 3(b) of the leases provides that MPR shall
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23 ² All of the plaintiffs’ leases are identical, save for the owners’ names, unit numbers, and
monetary figures.

1 reimburse to the Kosas “quarterly in respect to real estate taxes and shall pay homeowner’s
2 association assessments directly to the homeowner’s association as due.”

3 10. The monthly rent for Basil Kosa’s Unit 2-236 under the lease was \$1,782.00. The
4 monthly homeowner association (HOA) assessment was \$281.00 per month, and real property
5 taxes were \$316.00 per month.

6 11. The monthly rent for Nasir Kosa’s Unit 6-205 under the lease was \$2,598.00.
7 The monthly homeowner association (HOA) assessment was \$391.00 per month, and real
8 property taxes were \$558.00 per month.

9 12. The monthly rent for Raad Kosa and Said Matti’s Unit 7-205 under the lease was
10 \$2,618.00. The real property taxes were \$558.00 per month.³

11 13. Section 6(d) of the leases provides that “In the event the Property is uninhabitable
12 for any reason whatsoever (other than through the fault of Lessee), Lessee shall immediately
13 notify Owner In addition, if the Property is not rentable or is uninhabitable for a period
14 exceeding 60 consecutive days, the Lessee may terminate this Agreement immediately and
15 without prior notice of any kind.”

16 14. Section 18 of the leases states that “If either party shall institute any suit . . .
17 against the other in any way connected with this contract, the successful party shall recover from
18 the other a reasonable sum for its attorneys’ fees in connection with such suit”

21 ³ MPR objected (on grounds of leading and hearsay) to evidence of property taxes and
22 HOA assessments on this unit presented solely through the plaintiffs’ counsel’s questioning of
23 the witnesses. I allowed a proffer of the amounts, subject to my later decision on the objections.
The property taxes were later proved through Exhs. 20A-20M, but no such evidence was offered
to support the HOA assessments. I therefore sustain the objection as to the HOA assessment and
exclude this evidence.

1 15. MPR made three rental payments to the Kosas but then ceased all further
2 payments.

3 16. On June 20, 2008, the Clark County District Attorney's Office wrote a letter
4 addressed to the Meridian Private Residences Homeowners Association, Attn: Mr. Michael
5 Mackenzie. Exh. N. Mackenzie was an officer and employee of defendant American Invsco,
6 MPR's predecessor-in-interest. ECF Nos. 278-7 at 2, 278-8 at 6:19-21. The letter states, among
7 other things, that the condos cannot be rented for a period of less than 30 days because of various
8 provisions of the Clark County Code. In addition, "the Meridian has not satisfied all conditions
9 attached to the recent approval for resort condominiums . . . that are a pre-requisite to
10 commencing a resort condominium use." *Id.* The letter also states that "you and any
11 organization in which you are involved must immediately cease and desist from violating the
12 provisions of the Clark County Code" *Id.*

13 17. MPR contends that this letter triggered the termination provision in section 6(d) of
14 the leases.

15 18. MPR did not cooperate in returning possession of the condos to the Kosas and the
16 other plaintiffs. Rather, the plaintiffs had to take active steps to recover possession of their units,
17 including initiating eviction proceedings in some cases. One plaintiff, Mary Heldt, testified at
18 trial that MPR contested the eviction proceedings she initiated.

19 19. All of the plaintiffs either made reasonable efforts to mitigate their damages or
20 were prohibited from doing so by MPR's actions. None of the plaintiffs was able to fully
21 mitigate their damages.

22 20. Any item specified above which is wrongly stated as a finding of fact that should
23 have been set forth as a conclusion of law is so designated.

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1 required under section 6(d) of the leases—that the condos are not rentable or uninhabitable for a
2 period exceeding 60 consecutive days. Rather, the letter says that the condos cannot be rented
3 for a period of less than 30 days. Exh. N. No evidence was presented that the condos could not
4 be rented for a period of 30 days or longer.

5 7. MPR contends that the County’s “cease and desist” letter frustrated or rendered
6 impossible its intention to operate the Meridian as a resort condominium project. Each lease
7 granted to MPR “the right to occupy and use the Unit in conjunction with [its] operation of a
8 condominium resort (the “Condo Resort”).” *See, e.g.*, Exh. 13 at 1, ¶ 2(a). Clark County Code
9 section 30.08.03 defines a Resort Condominium as follows:

10 “Resort Condominium” means a commercial hotel condominium
11 development that can be subdivided into individual rooms or suites
12 for separate ownership or time share, and that may include cooking
13 facilities. A resort condominium **may be used for continuous,
unlimited residency** by a single individual, group or family and
14 may also be offered to the general public on a day-to-day basis, as
required and enforced by the covenants, conditions and restrictions
of the commercial condominium development. (emphasis added).

15 8. This definition of “Resort Condominium” allows long-term (e.g., over 30 days)
16 occupancy of the condos.⁴ The County’s letter did not prohibit long-term rentals nor did it
17 require the owners to obtain a license or pay taxes on rentals over 30 days. Thus, MPR could
18 have operated its resort condominium project with long-term rentals (i.e., over 30 days).

19 9. MPR argues that it intended to operate the Meridian condos as short-term rentals.
20 But the leases make no reference to “short-term rentals.” Each lease says that MPR was going to
21 use the condos “in conjunction with [its] operation of a condominium resort,” and that MPR was

22 ⁴ Clark County Code § 30.44.010(b)(7)(C) prohibits “transient commercial use of
23 residential properties.” But Code § 30.08.030 defines that term to exclude occupancy for 31
days or longer. Thus, neither the Code nor the County’s “cease and desist” letter prohibited
long-term rental of the condos for a resort condominium.

1 leasing the condos “with the intent to sublease” them. *See, e.g.*, Exh. 13 at 1, ¶¶ 2(a) and 4(a)(1).
2 The termination provision in section 6(d) makes no reference to an inability to rent on a short-
3 term basis. To the contrary, that section makes the lease terminable if the condos cannot be
4 rented for more than 60 consecutive days. *Id.* at 3, § 6(d) (“[I]f the Property is not rentable or is
5 uninhabitable for a period exceeding 60 consecutive days, the Lessee may terminate this
6 Agreement . . .”). If MPR wanted to be able to terminate based on the inability to conduct
7 short-term rentals, it could have written that into the leases. It did not, and it cannot now read
8 such language into the leases.⁵

9 10. MPR’s actions belie its argument that the leases were terminable because of the
10 County’s letter and lease section 6(d). MPR gave no notice of termination based upon
11 habitability or inability to rent. And if MPR intended to terminate the leases, it would have
12 turned over possession of the condos after receiving the County’s “cease and desist” letter. But
13 MPR did not cooperate in returning possession of the units to the plaintiffs. Rather, the plaintiffs
14 had to take active steps to recover possession of their units, and MPR fought the eviction
15 proceedings.

16 11. Finally, the placement of the “not rentable or is uninhabitable” language within
17 section 6 of the leases further suggests that MPR’s interpretation of the termination clause is not
18 correct. Section 6 is titled “Insurance,” and sub-section 6(d) is titled “Premises Uninhabitable.”
19 Section 6 addresses the need for the condo owner to maintain insurance, the requirement that
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21 ⁵ Section 11 of the leases, titled “Entire Agreement,” provides in relevant part, “This
22 Agreement constitutes the entire agreement between the parties with respect to the subject matter
23 hereof Owner and Lessee acknowledge that in entering into this Lease neither of them has
relied upon [any] statement by the other, other than as contained in this writing. Any
amendments or modifications to this Agreement must be in writing and must be signed by the
party against whom enforcement is sought.” Exh. 13 at 4-5, § 11.

1 MPR be named as an additional insured, MPR's right to reimbursement for losses, and what
2 happens should the property become uninhabitable.⁶ Thus, the "not rentable or is uninhabitable"
3 language in section 6(d), plainly read in this context, refers to loss of use of the condo due to
4 casualties that should be covered by insurance. It does not support MPR's argument that it was
5 meant to be triggered by an inability to conduct short-term rentals because of a county code
6 violation.

7 12. MPR next argues that, because the County's "cease and desist" letter was
8 addressed to the HOA, it was the HOA's obligation to obtain the appropriate County permits,
9 thus excusing MPR's performance. No evidence was offered showing or even suggesting any
10 obligation on the HOA, or any individual condo owner, to obtain County approvals. MPR was
11 to be the beneficiary of any payments from sublessees under the leases, and it was to receive the
12 profits from operating the resort condominium project. Therefore, it was MPR's obligation to
13 obtain the necessary approvals from the County. And the letter is addressed to Michael
14 Mackenzie (an officer and employee of defendant American Invsco, MPR's predecessor-in-
15 interest) and states that "you and any organization in which you are involved must immediately
16 cease and desist from violating the provisions of the" County Code. Exh. N. This strongly
17 suggests that the letter was directed at Mackenzie and MPR, not the HOA.

18 13. MPR next argues the leases were illegal because the plaintiffs did not obtain
19 business licenses to rent out their units to MPR. MPR argues that, because the subject matter of
20 the leases was illegal, as a matter of law the leases are unenforceable. But this situation falls
21 within the exception to this general rule of *in pari delicto*. The Supreme Court of Nevada has
22 repeatedly held that:

23 ⁶ MPR does not argue, and it presented no evidence, that the condos were uninhabitable.

1 the courts should not be so enamored with the latin phrase ‘in pari
2 delicto’ that they blindly extend the rule to every case where
3 illegality appears somewhere in the transaction. The fundamental
4 purpose of the rule must always be kept in mind, and the realities
5 of the situation must be considered. Where, by applying the rule,
6 [1] the public cannot be protected because the transaction has been
completed, [2] where no serious moral turpitude is involved,
[3] where the defendant is the one guilty of the greatest moral
fault, and [4] where to apply the rule will be to permit the
defendant to be unjustly enriched at the expense of the plaintiff, the
rule should not be applied.

7 *Magill v. Lewis*, 333 P.2d 717, 719 (Nev. 1958). *See also In re Amerco Derivative Litig.*, 252
8 P.3d 681, 696 (Nev. 2011) (en banc) (confirming continuing validity of the *Magill v. Lewis*
9 factors). Here, the public cannot be protected because the leases have already been completed,
10 there is no serious moral turpitude on behalf of the plaintiffs, and MPR (and its related
11 predecessors-in-interest)—not the plaintiffs—are guilty of the moral fault. To enforce the rule
12 here would be to permit MPR to be unjustly enriched at the expense of the plaintiffs. Therefore,
13 even if the leases could be considered illegal due to a licensing violation, that does not excuse
14 MPR’s breach.

15 14. MPR has made no showing of an excuse or other defense to its breach of the
16 leases. The Kosas are entitled to recover damages incurred as a result of MPR’s breaches.

17 15. As a result of MPR’s breaches of the leases, Basil Kosa is entitled to recover
18 damages for Unit 2-236 in the amount of \$49,959.00, which represents 21 months of lease
19 payments along with HOA dues and property taxes.

20 16. As a result of MPR’s breaches of the leases, Nasir Kosa is entitled to recover
21 damages for Unit 6-205 in the amount of \$74,487.00, which represents 21 months of lease
22 payments along with HOA dues and property taxes.

17. As a result of MPR's breaches of the leases, Raad Kosa and Said Matti are entitled to recover damages for Unit 7-205 in the amount of \$66,696.00, which represents 21 months of lease payments and property taxes.

18. Under section 18 of the leases, these plaintiffs are also entitled to recover from MPR a reasonable sum for their attorneys' fees incurred in connection with this lawsuit. They are also entitled to recover costs and interest on their award as allowed by law.

19. Any item specified above which is wrongly stated as a conclusion of law that should have been set forth as a finding of fact is so designated.

ORDER

IT IS THEREFORE ORDERED that plaintiff Basil Kosa is awarded damages against defendant Meridian Private Residences CH, LLC in the amount of \$49,959.00.

IT IS FURTHER ORDERED that plaintiff Nasir Kosa is awarded damages against defendant Meridian Private Residences CH, LLC in the amount of \$74,487.00.

IT IS FURTHER ORDERED that plaintiffs Raad Kosa and Said Matti are awarded damages against defendant Meridian Private Residences CH, LLC in the amount of \$66,696.00.

IT IS FURTHER ORDERED that these plaintiffs may file a motion to recover their reasonable attorneys' fees within 14 days of entry of this Order. Prior to filing that motion, they shall confer with Meridian Private Residences CH, LLC to determine whether they can agree on the appropriate amount of those fees. Any motion for fees shall include a certification that the parties have conferred in good faith to resolve the issue.

IT IS FURTHER ORDERED that these plaintiffs are awarded costs and interest as allowed by applicable law.

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1 IT IS FURTHER ORDERED that the clerk of court shall enter judgment accordingly.

2 DATED this 28th day of June, 2018.

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4 ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE